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No. 08-

Supreme Court, U.S.
FILED

08-184 AUG 12 2008

IN THE

Supreme Court of the United States OFFICE OF THE CLERK

114 TENTH AVENUE ASSOC., INC.,

Petitioner,

v.

NYCTL 1999-1 TRUST and THE BANK OF NEW YORK as Collateral Agent and Custodian for the NYCTL 1991-1 TRUST, KAREN NASON, NEW YORK CITY DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT b/f NYC BHO, NEW YORK CITY BUREAU OF HIGHWAY OPERATIONS, NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, NEW YORK CITY DEPARTMENT OF FINANCE and CARLTON CAPITAL CORP.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner has lost its valuable building in New York City to a tax foreclosure sale without having received any notice of the proceedings because the certified mailing of the notice to Petitioner was returned "unclaimed" and no follow-up notice was attempted, a violation of *Jones v. Flowers*, 547 U.S. 220 (2006).

The decision below found *Jones* inapplicable because the City had conveyed the tax lien foreclosed to a trust established to securitize City tax liens into bonds, turning tax delinquencies into quick cash. The trust was held to be a "private actor" despite its creation by the City, the City's ownership of and residuary interest in the trust and a code provision mandating that the trust "stand in the same position as the city" with respect to the tax liens sold.

The trust served the foreclosure summons by turning it over to the New York Secretary of State, who sent it certified mail to an obsolete address for Petitioner, causing the mailing to be returned "unclaimed." The trust never inquired whether the mailing was delivered or not, and otherwise made no effort to give actual notice to the Petitioner, despite the trust's having Petitioner's address readily available; a trial court order to serve an interlocutory paper on Petitioner, which the trust ignored; and Petitioner's continuing payments of taxes in ignorance of these proceedings.

As such, this Petition presents two questions regarding notice of a tax lien foreclosure proceeding:

1) May a city avoid responsibility for the due process notice obligations of a governmental actor by conveying tax liens to a trust created by the city in order to reduce its duties under the Fourteenth Amendment to those of a mere private actor?

2) May a city-created tax lien trust avoid the due process requirement to attempt additional notice when the initial notice is returned unclaimed, as set out in *Jones v. Flowers*, by electing to serve a foreclosure summons through a state official, with full knowledge that the official will not inform the trust if the certified mailing of the summons is returned, and then by foreclosing on default without asking the official whether the summons was delivered?

LIST OF PARTIES

The parties below are listed in the caption.

CORPORATE DISCLOSURE STATEMENT

The Petitioner, 114 Tenth Avenue Assoc., Inc. is a New York corporation wholly owned by an individual shareholder, Mr. Zvadin Krstic.

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INTRODUCTION

In 2006, this Court decided *Jones v. Flowers*, 547 U.S. 220 (2006), clarifying an important principle of the ordered liberties cherished in this nation: That a government seizing private lands for nonpayment of taxes has a duty to its own citizens to act as one who genuinely desires that the taxpayer receive fair notice of the foreclosure. Rejecting this important principle, the Appellate Division of New York's Supreme Court allowed New York City to avoid its duty to provide due process to its property owners by letting stand the foreclosure of a City tax lien. The Appellate Division inappropriately accepted two artificial distinctions between the foreclosure involved here and that in *Jones*, namely that the foreclosure was prosecuted by a trust the City created, and not the City itself; and that the foreclosure notice was returned after the trust caused it to be mailed by the New York Secretary of State, rather than its being mailed by the trust itself.

New York City and numerous other municipalities nationwide sell their tax liens to trusts they create, which in turn sell bonds securitized by the tax liens and pay the proceeds to the municipalities, thereby converting their tax delinquencies into readily available cash. The court below ruled that such a trust is a private actor relieved of the due process responsibilities that the Fourteenth Amendment places on governmental bodies. If allowed to stand, this carves out an exception to *Jones* which will permit municipalities across the nation to nullify *Jones* by forming their own tax lien trusts free of governmental due process obligations. Furthermore, the court below held that such a trust may elect to evade

Jones by using a substituted method of serving notice of tax foreclosures under which the trust avoids finding out whether the certified mailing of the notice was returned to the sender unclaimed, and enjoys no duty to even ask if the mailing succeeded before foreclosing upon the property owner's default.

OPINION BELOW

The decision of the Appellate Division of the Supreme Court of the State of New York, First Department ("Appellate Division") (App. A), is reported at 44 A.D.3d 576, 845 N.Y.S.2d 235, 2007 N.Y. Slip Op. 08115 (1st Dep't 2007). This decision affirmed an unreported order of Supreme Court of the State of New York, County of New York (the trial court) filed September 22, 2005 (App. D) denying the motion of Petitioner 114 Tenth Avenue Assoc., Inc. ("114 Tenth") to vacate a Judgment of Foreclosure and Sale and foreclosure sale, and an unreported order of the trial court filed December 20, 2006 (App. C) denying 114 Tenth's motion for renewal of its vacatur motion.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257.[1] 114 Tenth never received notice of this foreclosure proceeding and lost its land and building located at 114 Tenth Avenue, New York, New York (the "Property") in a foreclosure sale held without its

[1] 28 U.S.C. § 2403(b) does not apply because the New York Attorney General has been served as attorney for Respondent New York State Department of Taxation and Finance.

knowledge. When 114 Tenth learned of the sale from the winning bidder the day after it happened, it promptly obtained a stay of the closing of the sale pending its litigation to vacate the sale. The closing has remained stayed during the proceedings below,[2] with the most recent extension staying the closing through this Court's review. If this Court does not act, 114 Tenth will lose title to its property. As 114 Tenth is facing the immediate conveyance of its Property, the order below is considered final because "the controversy [has] proceeded to a point where a losing party would be irreparably injured if review were unavailing." *Republic National Gas Co. v. Oklahoma*, 344 U.S. 62, 68 (1948); *see also Radio Station WOW v. Johnson*, 326 U.S. 120, 126 (1945) ("a judgment directing immediate delivery of physical property is reviewable").[3]

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[2] The closing was also automatically stayed because 114 Tenth filed a chapter 11 bankruptcy petition on November 10, 2005 in the U.S. Bankruptcy Court for the Southern District of New York, *In re 114 Tenth Avenue Assoc., Inc.*, No. 05-60099(ALG), though this bankruptcy stay was lifted on February 8, 2006 to permit reargument and appeal.

[3] The decision below is final under 28 U.S.C. § 1257 despite there being further proceedings required to distribute the proceeds of sale, *see* New York Real Property Actions & Proceedings Law § 1362, because "[a]n order decreeing immediate transfer of possession of physical property is final for purposes of review even though an accounting for profits is to follow." *Republic*, 344 U.S. 68. The distribution proceedings will not affect finality because they will involve only state law issues. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975) (cases final despite remaining state courts proceedings, where "the federal issue . . . will survive and require decision regardless of the outcome of future state-court proceedings . . . [which] 'could not remotely give rise to a federal question.'" (quoting *Radio Station WOW*, 326 U.S. at 127)).

All avenues of further appeal within the New York court system have been exhausted. The New York Court of Appeals dismissed, *sua sponte*, 114 Tenth's appeal on state finality grounds (App. E), and on June 3, 2008 denied a timely motion for reconsideration of its *sua sponte* dismissal. (App. F).[4] 114 Tenth's motion in the Appellate Division for reargument or, in the alternative, discretionary appeal to the Court of Appeals was denied in a February 26, 2008 order. (App. B). Although the New York Court of Appeals considers this case non-final for its purposes, as this Court recognized in a case addressing a similar New York order, the question of whether a judgment is 'final' under 27 U.S.C. § 1257 is "purely a question of federal law," which is entirely different from the finality requirement for jurisdiction under the New York Constitution. *Gotthilf v. Sills*, 375 U.S. 79, 80 (1963) (certiorari from Appellate Division decision would have been available after Court of Appeals finality dismissal had petitioner had sought discretionary appeal in Appellate Division). As such, this

[4] Although the Court of Appeals did not explain why it considered the Appellate Division order non-final, it appears that under the idiosyncratic Court of Appeals finality jurisprudence, a denial of a motion to vacate a final order (which the Judgment of Foreclosure and Sale is considered to be) is considered a non-final order. *Aponte v. Raychuk*, 78 N.Y.2d 992, 580 N.E.2d 758, 575 N.Y.S.2d 272 (1991) ("Appellate Division order, to the extent it affirms the denial of defendant's motion to vacate a default, is nonfinal and thus nonreviewable"); *Lincoln Savings Bank v. Warren*, 72 N.Y.2d 883, 528 N.E.2d 518, 532 N.Y.S.2d 366 (1988) (appeal of affirmance of denial of motion to vacate judgment of foreclosure and sale dismissed as non-final under N.Y. Const.); *see generally* Karger, Arthur, Powers of the New York Court of Appeals § 4:15 at 93-94 (rev. 3d ed. 2005).

Court has jurisdiction under 28 U.S.C. § 1257 over a final judgment "rendered by the highest court of a State in which a decision could be had."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The due process clause of the Fourteenth Amendment to the U.S. Constitution provides: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law."

Statutory substituted service on the New York Secretary of State (the "Secretary") is authorized under the New York Business Corporations Law ("BCL"). The BCL provisions involved herein, BCL §§ 304(a), 306(b)(1) & 308, are set forth in relevant part in Appendix G.

Tax liens, tax lien sales, and tax lien foreclosures in the City of New York (the "City") are governed by the New York City Administrative Code (the "NYC Code"). The NYC Code provisions involved herein, NYC Code §§ 11-319(b)(2)(i), 11-332(a), 11-335, 11-340, & 11-347, are set forth in relevant part in Appendix H.

STATEMENT OF THE CASE

A. The Establishment and Operation of the Trust

Respondent NYCTL 1999-1 Trust (the "Trust"), is a trust created by New York City under a program in which the City conveys delinquent tax liens a series of trusts (the "NYCTL Trusts") as part of securitized transactions under which the City immediately receives

the proceeds of tax lien revenue bonds.[5] The City creates, owns, selects the trustee and custodian of, and is the residual beneficiary of each of the NYCTL Trusts in compliance with NYC Code § 11-319(b)(2)(i), which permits simplified negotiated sales to "a trust or other entity created by the city or in which the city has an ownership or residual interest."

The Trust at issue in this case issued bonds in the amount of $45 million after the City conveyed 2,632 liens with a total value of $48 million to the trust. This conveyance was documented by a Tax Lien Certificate dated June 20, 2002, with an amendment dated August 8, 2002, recorded in the City Register's land title records against each of the properties subject to the liens.[6]

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[5] A 2003 City Council Finance Committee report (included in the record below) describes the tax lien sale process as follows:

> The tax lien sales under the new procedures have all been securitized transactions in which a single purpose Trust is established. This Trust issues bonds to institutional investors collateralized by the delinquent tax liens and surcharge liens. The money raised by the issuance of the bonds (as well as a subordina ted note issued by the Trust) is then used to acquire a portfolio of tax liens which include City of New York liens (property tax liens), Water Board liens and Business Improvement District liens. The City, the Water Board and the Business Improvement Districts retain a residual interest in the Trust.

[6] The June 20, 2002 Tax Lien Certificate conveyed the Trust "all of the City's right, title and interest in and to all real (Cont'd)

Among those 2,632 liens was a lien against 114 Tenth's real property in the amount of $18,812.42.

Although tax liens are purportedly conveyed to the NYCTL Trusts, under the NYC Code, the City retains substantial control and involvement in the management and oversight of the liens and the NYCTL Trusts themselves. Also, NYC Code § 11-332(a) provides, in full, that: "Any purchaser of a tax lien or tax liens shall stand in the same position as the city and shall have all of the rights and remedies that the city would have had if the tax lien or tax liens had not been sold." *See also In re Mill Creek Phase 1 Staten Island Bluebelt System*, 10 N.Y.3d 898, 2008 N.Y. Slip Op. 05304, 2008 WL 2338631 at *1, (June 10, 2008) (NYCTL Trust "stands in the shoes of, and has the same rights as, the City"). The NYC Code further provides that the City's chief attorney, the Corporation Counsel, has the right at any time to assume representation of any purchaser of a tax lien, a right which was exercised here. NYC Code § 11-347.

Notwithstanding the NYC Code provision requiring the Trust to stand in the shoes of the City, when the City conveys the tax liens to the Trust, the delinquencies the liens represent are no longer recorded on the City's books. As a result, when 114 Tenth obtained its post-lien sale tax balance due from the City and paid that full

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property taxes, ... and other City charges that have prior to the date hereof become a lien" (i.e. are past due). (The August 8, 2002 Amendment modified this language, but not in a manner relevant to the present case.)

outstanding balance, the balance did not include the amount of the delinquency conveyed to the Trust by the tax lien sale.[7] Additionally, the City apparently never informed the Trust (supposedly standing in its shoes) that 114 Tenth was continuing to pay its property taxes during the time the Trust was prosecuting this tax foreclosure action. Whatever administrative convenience this may offer to the Trust and the City, to the extent that this insulation of information acts to deprive the Trust of unique information posed by the City about its tax debtors, it is another mechanism whereby the City evades *Jones*.

B. The Trust's Service Upon 114 Tenth

On May 20, 2003, the Trust commenced the tax lien foreclosure action here, listing Petitioner's actual business address (and the address of the Property), 114 Tenth Avenue, New York, New York on the face of the summons. Despite the Trust's having 114 Tenth's actual address, at which it could have effected personal service, the Trust elected to serve 114 Tenth through substituted service upon the New York Secretary of State under BCL § 306(b). By selecting this service option from the many alternatives available under New York law, the Trust chose the sole method of service

[7] On February 10, 2003, 114 Tenth's president went to the City's tax offices, requested his tax balance and paid what he was told. Although 114 Tenth believed it had fully satisfied its tax obligations, the City's policy of writing off tax delinquencies conveyed to NYCTL Trusts meant that it never learned of the balance due the Trust, which it was then willing and able to pay. Thereafter, 114 Tenth continued to make tax payments in ignorance of the pendency of this foreclosure proceeding.

under which notice would be sent by certified mail but the Trust was guaranteed not to learn whether the certified mailing was successful without affirmative inquiry on its part.

As required by BCL § 306(b), the Secretary sent a certified mailing to the address of 114 Tenth on its records. However, the certified mailing was returned marked "unclaimed" because the address on the Secretary's records was outdated, and the Secretary duly recorded the return of the "unclaimed" mailing in departmental records under BCL § 308. However, the Secretary was not required under the BCL or any other law to inform the Trust that 114 Tenth failed to receive actual notice of this foreclosure action. Even though 114 Tenth failed to appear in this action while simultaneously continuing to pay property taxes, the Trust never inquired whether the certified mailing was delivered to 114 Tenth. The Trust proceeded to prosecute the foreclosure on 114 Tenth's default without any further effort to contact 114 Tenth for the nearly two years between the commencement of the case and the March 1, 2005 entry of the Judgment of Foreclosure and Sale. Indeed, the Trust simply disregarded an express direction in the trial court's Amended Order of Reference that "a copy of this Order . . . shall be served upon the owner of the equity of redemption" (i.e., 114 Tenth).[8] Though the Trust's noncompliance was

[8] The foreclosure judgment had a similar provision with which the Trust ineffectually complied by making a mailing to an incomplete address that 114 Tenth never received. *See New York Housing Authority v. Fountain*, 172 Misc.2d 784, 787, 660 N.Y.S.2d 247, 250 (N.Y.C. Civ. Ct. 1997) (service omitting ZIP (Cont'd)

repeatedly pointed out in 114 Tenth's papers in the state court proceedings, no court below expressly addressed the Trust's blatant failure to provide court-ordered notice.

114 Tenth did not receive actual notice of the foreclosure proceedings until after the court-appointed referee held a May 18, 2005 public foreclosure auction sale that was won with a bid of $2 million, against the Trust's tax lien certificate in the amount of $18,812.42. An appraisal of the Property shortly thereafter valued it at $3.2 million.

C. Proceedings After 114 Tenth Learned of the Foreclosure

The day after the referee's sale, 114 Tenth learned of the proceedings from a tenant who met an agent of the winning bidder who was investigating the Property. Eight days later, 114 Tenth made an emergency motion by order to show cause seeking to vacate the Judgment of Foreclosure and Sale and the referee's foreclosure sale on the grounds, *inter alia*, that 114 Tenth had never received notice of the foreclosure proceedings and was thus "deprived of their property without due process." The trial court denied (App. D) this emergency motion, rejecting 114 Tenth's due process argument by citing a New York case, *Raschel v. Rish*, 69 N.Y.2d 694, 697, 504

(Cont'd)

code not "reasonably calculated to inform the [defendants] of the proceedings"); U.S Postal Service, Domestic Mail Manual § 602.1.4.2 (July 3, 2008) (complete address must include "Correct 5-digit ZIP Code or ZIP+4 code").

N.E.2d 389, 512 N.Y.S.2d 22 (1986), which analyzed service requirements under the federal standard set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

On May 4, 2006, 114 Tenth moved for renewal of the trial court's order denying vacatur based, *inter alia*, on the due process analysis in *Jones*, which had been decided by this Court eight days previously. This motion was denied (App. C), with a detailed analysis of the service under *Jones*.

After a timely appeal, the Appellate Division affirmed both the trial court's vacatur and the renewal orders in a single order (App. A) the order upon which certiorari review is sought in this Court. In this order, the Appellate Division purported to distinguish *Jones* and, for the first time in these proceedings, ruled – without citing any authority – that the Trust was to be treated as a private actor. In both the trial court and on appeal, 114 Tenth had preemptively argued that because the City was so intertwined with the creation and operation of the Trust, its nominally private nature would not relieve it of its governmental actor responsibilities, and no opposing party countered with any legal authority to suggest that the Trust should be treated as a private actor.

As detailed in the Statement of Jurisdiction above, 114 Tenth exhausted all avenues for further state court review. Although 114 argued at each stage for the reversal of the Appellate Division's rulings on the constitutionality of service and the Trust's private actor status (and no opposing party ever argued that the

private actor ruling was correct), each subsequent decision was a summary denial of reconsideration or further review, not addressing the substance of the arguments. (Apps. B, E & F).

REASONS FOR GRANTING THE PETITION

I

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT BELOW ERRED IN FINDING THAT THE TRUST WAS A PRIVATE ACTOR NOT BOUND BY FOURTEENTH AMENDMENT OBLIGATIONS

The petition should be granted because the decision below, which held that the Trust was a "private actor," is contrary to this Court's established precedent that governments may not avoid their Fourteenth Amendment state actor obligations by operating through ostensibly private entities that they establish. Disregarding the relevant decisions of this Court, the Appellate Division held – without citing any authority – that the present case was distinguishable from *Jones* in that the Trust was considered a non-governmental actor:

> The instant circumstances are readily distinguishable from *Jones*, which concerned the sufficiency of notice provided to an individual by a state government of a tax delinquency and of an impending tax sale of

> the individual's property, whereas here, process was served by a private actor upon 114 Tenth Avenue. (App. A at 2a-3a)

Through this ruling, the Appellate Division has opened the door to a glaring loophole in *Jones* through which a municipality may evade the Fourteenth Amendment to deprive its property owners of due process by simply transferring its tax liens to a trust that it creates. This loophole poses a substantial risk to property owners situated in the many jurisdictions that already participate in the securitization of tax liens through tax lien trusts, as well as in those jurisdictions that may establish tax lien trusts to minimize their notice obligations in reliance on the decision below.

This Court has long held that that a government cannot evade its constitutional obligations by simply resorting to a corporate or trust form. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995); *Evans v. Newton*, 382 U.S. 296, 298 (1966). State action is attributed to ostensibly private entities when "there is such a 'close nexus between the State and the challenged action' that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Academy v. Tenn. Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Under *Brentwood*, several factors are considered in establishing that a nominally private entity must be treated as a state actor, including: the source of authority for the supposedly private action, the control of a nominally private entity by an agency of the state, "when it is entwined with governmental policies or when gove nment is entwined

in its management or control" and the delegation of a public function to a nominally private entity. 531 U.S. at 288-89, 296; *see also Evans*, 382 U.S. at 298 ("When private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations").

In the instant case, the City established the Trust under a City program, implemented under the City's local laws, in which the City sold tax liens to the City-established Trust as collateral for bonds, the proceeds of which the City received for its immediate use. The City is the grantor of the Trust, is the owner of the Trust under its trust declaration, has selected the trustee and custodian, is entitled to represent the Trust at law and is the residuary beneficiary of the Trust, entitled to all proceeds available after the bondholders are paid. Furthermore, the City established a continuing tie to the tax liens "sold" to the Trust in that the Trust "shall stand in the same position as the city" with respect to the tax liens and "have all the rights and remedies that the city would have had if the tax lien or tax liens had not been sold." NYC Code § 11-332(a); *In re Mill Creek Phase 1*, 2008 WL 2338631 at *1. Moreover, in delegating the very public function of tax collection to the Trust, the constitutional obligations the City and the Trust owe to property owners are "certainly not dissipated *ipso facto* by the appointment of 'private' trustees." *Evans*, 382 U.S. at 301. As such, the Trust satisfies the *Brentwood* test, 531 U.S. at 296, and therefore should be considered a state actor in spite of its nominally private status.

Although this case deals with New York City procedures, the implications of this decision reach well beyond the eight million citizens of New York. If the Appellate Division private actor holding is allowed to stand, property owners anywhere in the United States face the risk of losing their due process rights whenever an ostensibly private tax lien trust initiates a foreclosure action. Currently, 28 states, the District of Columbia, Puerto Rico and the Virgin Islands have enabling legislation authorizing their local governments to sell tax liens for unpaid real estate tax bills,[9] and five jurisdictions have authorized "private" tax lien trusts: Connecticut, the District of Columbia, New Jersey, New York City, and Philadelphia.[10] If the holding of the Appellate Division were adopted in any of these other jurisdictions, governments there could easily duck their Fourteenth Amendment obligations to provide due process in tax foreclosures by simply conveying their tax liens to "private" trusts they set up. As such, certiorari should be granted to confirm that private tax

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[9] These 28 states are: Alabama, Arizona, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Mississippi, Montana, Missouri, Nebraska, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, West Virginia, Wisconsin and Wyoming. For a discussion of the more than 150 different systems used for enforcing property tax collections across the U.S., *see* Alexander, Frank S., *Tax Liens, Tax Sales & Due Process*, 75 Ind. L. J. 747 (2000).

[10] Additionally, bulk sales of tax liens are permitted in Waterbury, Connecticut, Fulton County, Georgia and the following counties in Ohio: Cuyahoga, Franklin, Lucas, Montgomery and Summit.

lien trusts are indeed public actors subject to the constraints of the Constitution, as construed by *Jones*, and to prevent other jurisdictions from denying their property owners due process by following the New York precedent below.

II

THE PETITION SHOULD BE GRANTED BECAUSE THE TRUST VIOLATED 114 TENTH'S FOURTEENTH AMENDMENT RIGHTS BY NOT GIVING PROPER NOTICE OF THE FORECLOSURE ACTION

Certiorari is proper here because the Appellate Division's decision conflicts sharply with this Court's due process holdings applicable to tax foreclosures and as a result deprives 114 Tenth of its Fourteenth Amendment right not to have its Property taken without due process. Further, certiorari should be granted because the Appellate Division has decided this important federal Constitutional question in a way that conflicts with the decisions of other state courts of last resort and United States Courts of Appeal. Recognizing that tax foreclosure represents "extraordinary power against a property-owner – taking and selling a house he owns," *Jones*, 547 U.S. at 239, this Court has held that the Fourteenth Amendment protects property owners by requiring notice and an opportunity to a hearing appropriate to the nature of the case. *Jones*, 547 U.S. at 234; *Mullane*, 339 U.S. at 313. Furthermore, this Court has "required the government to consider unique information about an intended recipient regardless of

whether a statutory scheme is reasonably calculated to provide notice in the ordinary case." *Jones*, 547 U.S. at 230.

In providing notice of the foreclosure here, the Trust elected to use substituted service on the Secretary of State, a procedure which, as applied in New York and in the majority of other states, causes a certified or registered mailing to be sent to a defendant but gives the plaintiff no information regarding whether the mailing is returned undelivered unless the plaintiff makes a specific inquiry. By electing to use such a procedure without making any further inquiry, the Trust knowingly blinded itself to the readily available information that 114 Tenth did not receive notice. Moreover, it is well-known to New York practitioners that the substituted service statute the Trust elected to use here, BCL § 306(b), commonly results in the failure of actual notice, so its use by the Trust without any further attempts to discern whether notice was in fact received is a particularly egregious violation of *Mullane*'s requirement that one act as "one desirous of actually informing the absentee." 339 U.S. at 315. The decision below permitting such service conflicts both with this Court's precedent and decisions around the country which hold that, under *Jones*, mere statutory compliance is insufficient where available information shows that such statutory compliance fails to provide actual notice.

A. New York and the Majority of States Permit Substituted Service on a State Official Where the Official Mails Notice but Does Not Inform the Plaintiff When the Official Learns the Defendant Did Not Receive the Mailing

The due process issues here occurred because the Trust elected not to serve 114 Tenth personally, choosing instead to effect substituted service by serving the corporation through the New York Secretary of State.[11] In addition to New York, 33 states and the District of Columbia[12] permit substituted service by delivery of process to the state's Secretary of State or other designated official ("Substituted Secretary Service"), where the state official is designated by statute as an "agent" of the corporation for the purpose of receipt of the process. However, this Court has recognized that such an "agency" by statutory fiat differs from an actual, consensual agency in a due process analysis. *Wuchter v. Pizzutti*, 276 U.S. 13, 24 (1928) (rejecting service on Secretary of State as statutory "agent"); *see also Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 703 (1988) (affirming service on subsidiary found to be actual agent, in contrast to "the deposit of documents with a designated local official [who] generally is supposed to transmit the documents");

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[11] The procedural rules of each state permits plaintiffs to effect personal service upon a corporation, usually by delivery of process to an officer or agent of the corporation. *Cf.* Fed. R. Civ. P. 4(h)(1) (service "by delivering a copy of the summons and of the complaint to an officer, a managing or general agent").

[12] To simplify this discussion, hereafter the District of Columbia will be considered and counted as a state.

see also Restatement (Second) of Agency, § 1, cmt f. (1958) ("Although such a statute may label the public official an "agent" for receiving service of process, he is not an agent in the sense used herein. He is not in fact designated by the one on whose account he 'accepts service', nor does he respond to that person's directions"); *Leighton v. Roper*, 300 N.Y. 434, 442, 91 N.E.2d 876, 881 (1950) ("an agency created, not for the benefit of the principal, but for the benefit of third persons, . . . as well as the State").

Of the states permitting Substituted Secretary Service, 29 follow a procedure like the New York procedure used here, in which the plaintiff delivers copies of the process to the official, and the official sends a copy of the process to the defendant by certified or registered mail at an address on file or provided by the plaintiff.[13] Under the law of each of these states, with one exception, the official will learn if the mailing is returned undelivered, but will not inform the plaintiff of the non-delivery unless the plaintiff specifically inquires.[14] Where a foreclosing authority elects to use

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[13] In six states, the plaintiff is required to file a copy of the process in the office of the state official and to separately send a copy to the defendant by certified or registered mail. Under this scheme, the official merely acts as a depository for the process and the plaintiff will be informed of any non-delivery of the process, because the plaintiff's mailing will be returned directly to him or her. (In New York the Secretary of State mails process directly to domestic and authorized foreign corporations, while unauthorized foreign corporations are served by the deposit method described in this footnote. BCL § 307).

[14] Montana has a unique provision under which the Secretary of State is required send an affidavit of the (Cont'd)

Substituted Secretary Service to provide notice of in any of these states,[15] the foreclosing authority does not learn whether the mailing of the notice is returned undelivered, and thus it can avoid its obligation under *Jones* to act further to get notice into the property owner's hands. Of the five jurisdictions that permit sales to tax lien trusts, four of them, Connecticut, the District of Columbia, New Jersey and New York, have Substituted Secretary Service which provides no notice if the official's mailing is not delivered.

As such, unless this Court finds that foreclosing authorities have a duty of reasonable inquiry about the actual results of Substituted Secretary Service mailing, permitting such Service will provide a vector by which the notice requirements of *Jones* may be evaded in the majority of states.

(Cont'd)
circumstances of the mailing to the plaintiff's attorney. Mont. R. Civ. P 4(D)(6). In all other states, the official either does nothing or provides a report on the service to the court clerk, but not the plaintiff.

[15] New York and West Virginia permit plaintiffs to freely elect Substituted Secretary Service without prerequisite. In all other states, Substituted Secretary Service is subject to certain conditions, typically failure to appoint or unavailability of a registered agent or inability to effect personal service.

B. New York BCL § 306(b), Without Any Other Efforts To Give Notice, Does Not Provide Reasonable Notice To Property Owners in Tax Foreclosures

In prosecuting this tax foreclosure action, the Trust elected to serve 114 Tenth by making substituted service on the New York Secretary of State under BCL § 306(b) without inquiring whether the Secretary's mailing was delivered, and to take no further steps to notify 114 Tenth of the commencement or pendency of the foreclosure prior to judgment (even ignoring a trial court order to serve 114 Tenth with an interlocutory order). Although the Trust undertook the minimum efforts required by the statute to provide notice, it cannot claim to have taken efforts "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," *Mullane*, 339 U.S. at 315, particularly in light of the well known deficiencies of BCL § 306(b) service and the absence of any measures to mitigate such deficiencies in tax foreclosure actions. *See Greene v. Lindsey*, 456 U.S. 444, 454 (1982) (no due process where method "not infrequently" failed to provide actual notice). As such, the notice given was not "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them of an opportunity to present their objections." *Mullane*, 339 U.S. at 314.[16]

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[16] In *Jones* this Court explained that "the constitutionality of a particular procedure for notice is assessed *ex ante*", and not based on the results of any particular case. 547 U.S. at 231. The analysis here is based on a *ex ante* review of how the procedures used – and the safeguards not used – are not reasonable under the circumstances, not a *post hoc* review of the failure of notice in this particular situation.

New York is a state that permits Substituted Secretary Service upon domestic and authorized foreign corporations via transmission of the process by the Secretary to the defendant by certified mail, return receipt requested. BCL § 306(b). The Secretary keeps records of the results of the service, BCL § 308, but does not inform the plaintiff whether a mailing is returned. Plaintiffs may, however, make a simple, free inquiry of the Secretary's office to find out all of the details of the service, including whether and why the mailing was returned undelivered.[17] (Had the Trust inquired, as someone interested in actually providing notice would have, it would have learned that the Secretary's mailing here was returned "unclaimed," the same as the mailing returned in *Jones*.)

Under BCL § 306(b)(1): "Service of process on such corporation shall be complete when the secretary of state is so served." New York courts hold that service on the Secretary is complete and valid "irrespective of whether the process subsequently reached defendant," and even when non-delivery is due to the Secretary's own error. *Spearman v. Atreet Corp.*, 238 A.D.2d 194, 656 N.Y.S.2d 30 (1st Dep't 1997); *Micarelli v. Regal Apparel, Ltd.*, 52 A.D.2d 524, 381 N.Y.S.2d 511 (1st Dep't 1976) (good service when Secretary did not mail process at all); *NYCTL 1998-1 Trust v. Oneg Shabbos Inc.*,

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[17] As set forth in the record below, the New York Department of State has a policy of responding to telephone or written public inquires free of charge, providing all of the information it keeps on service of process, including whether and when the certified mailing was delivered or, if it was returned, the post office notation regarding the reason for return.

8 Misc. 3d 645, 646 n.1, 800 N.Y.S.2d 808, 809 n.1 (Sup. Ct. 2005) (no defect in service when process mailed to erroneous address), *modified on other grounds*, 37 A.D.3d 789, 830 N.Y.S.2d 763 (2d Dep't 2007).[18] It is well known to New York litigators that service under BCL § 306(b) will frequently result in a corporation's not actually receiving notice of the process served.[19] Professor David D. Siegel, New York's leading commentator on state civil practice, has noted that under BCL § 306(b) service: "Often a default results because the mailed copy doesn't reach the corporation . . . for the reason that the corporation failed to record a proper change of address on the secretary's records." Siegel, David D., Practice Commentaries to N.Y. Civil Practice Law & Rules ("CPLR") 5015, C5015:6 (McKinney's 2007). Indeed, New York courts have repeatedly recognized that plaintiffs have often "chose[n] to make service on the Secretary of State knowing that such service . . . was calculated to, and in fact did, avoid actual notice of this action until after judgment was entered." *Mintz v. Astoria Holding Corp.*, 56 A.D.2d 595, 596, 391 N.Y.S.2d 650, 650 (2d Dep't 1977)

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[18] As discussed above, New York's statutory designation of the Secretary as "agent" under BCL § 304(a) does not render the Secretary an actual agent for due process purposes. *Wuchter*, 276 U.S. at 24 (1928); *Volkswagenwerk*, 486 U.S. at 703 (1988); Restatement (Second) of Agency, § 1, cmt f. (1958).

[19] Indeed, Plaintiff must be aware of this frequent result, as sister NYCTL Trusts have faced claims that corporate property owners did not receive process served on the Secretary of State. *See NYCTL-1 Trust v. Liberty Bay Realty Corp.*, 21 A.D.3d 1013, 801 N.Y.S.2d 346 (2d Dep't 2005); *Oneg Shabbos Inc.*, 8 Misc. 3d at 646 n.1, 800 N.Y.S.2d at 809 n.1.

(reversing denial of motion to vacate where plaintiff was aware of whereabouts of defendant corporation); *see also Stein v. A. Matarasso & Co.*, 143 A.D.2d 825, 826, 533 N.Y.S.2d 126, 127 (2d Dep't 1988) (plaintiff "had knowledge of the defendant's actual business address [and thus] could have effectuated service under CPLR 311 [personal service upon corporation]"). Indeed, because the service address the Secretary will use for mailing to each corporation is readily available on the internet,[20] it can be easy for a plaintiff seeking to avoid actual notice to determine if BCL § 306(b) service is likely to result in non-delivery.[21]

Given the well-known propensity of BCL § 306(b) service to fail to provide actual notice, the Appellate Division's refusal to vacate this tax foreclosure caused by an obsolete address on file with the Secretary (App. A at 2a) conflicts with *Jones*, which rejected the contention that a person's "failure to comply with a statutory obligation to keep his address updated forfeits

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[20] Further, because BCL § 306(b) service is only permitted on domestic or authorized foreign corporations, plaintiff's counsel will typically make an inquiry prior to service either by telephone or the internet as to whether such service is permitted. Cf. BCL § 307 (separate procedure for service on unauthorized foreign corporations). An internet inquiry will automatically list the Secretary's service address, and the Secretary's office will provide such information upon request in a telephone inquiry.

[21] Indeed, the Trust has an incentive to delay notice – and the potential for redemption – because the tax liens it holds earn it 18% interest, well above what it must pay on its bonds. *In re Mill Creek Phase 1*, 2008 WL 2338631 at *1.

his right to constitutionally sufficient notice." 547 U.S. at 232; *see also Robinson v. Hanrahan*, 409 U.S. 38 (1972) (notice served on an address maintained with Secretary of State insufficient when plaintiff knows address is incorrect).[22] Likewise, the Appellate Division's requirement of a meritorious defense (App. A at 2a) conflicts with *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988), which established that where notice is defective, due process prohibits requiring a meritorious defense as a condition to vacating a default. *Peralta* rejected the argument that "without a defense, the same judgment would again be entered on retrial and hence [the defendant] had suffered no harm," instead observing that if the defendant "had notice of the suit, he might have . . . worked out a settlement or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than to suffer it to be sold at a constable's auction." *Id.* at 85. This observation is particularly apt here, because 114 Tenth would have undoubtedly redeemed the property (appraised at than $3.2 million), for the judgment amount (including interest) of approximately $27,000, rather

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[22] The deficiencies in BCL § 306(b) service are particularly harsh in foreclosure actions because New York courts hold that once the hammer falls in a foreclosure sale, they are without discretion to set the sale aside, absent "fraud, collusion, mistake, or misconduct" or pre-sale redemption. *NYCTL 1996-1 Trust v. LFJ Realty Corp.*, 307 A.D.2d 957, 763 N.Y.S.2d 836 (2 Dept. 2003) (refusing to set aside sale when pre-sale payment was made to trust directly, rather than into court).; *Oneg Shabbos Inc.*, 8 Misc. 3d at 646, 800 N.Y.S.2d at 809 (notice sent to incorrect address).

than facing the depressed price of a public auction, here merely $2.0 million.[23]

Here, the Trust elected to effect service through the Secretary under BCL § 306(b), a procedure which conceals whether notice was actually received, to not ask the Secretary's office if the notice was delivered, and to take no other measures to provide notice to 114 Tenth. The Trust's failure to make a simple, free inquiry regarding whether 114 Tenth actually received notice was particularly unreasonable since 114 Tenth had continued to pay its taxes to the City, something the Trust should be held to be on notice of as alter ego of the City under NYC Code § 11-332(a). Accordingly, the process the Trust used was unreasonable and deficient as it was neither "reasonably calculated, under all the circumstances, to apprise" 114 Tenth of the impending foreclosure nor was it means "such as one desirous of actually informing the absentee might reasonably adopt to accomplish" notice to 114 Tenth. *Mullane*, 339 U.S. at 314-15.

C. Since the Trust Elected to Provide Notice Through a Government Official, The Trust Is Responsible for the Actions of the Official

Had the Trust served 114 Tenth by a private process server, it unquestionably would be held responsible for the actions of the process server and charged with the

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[23] Indeed, if the foreclosure sale is vacated here, 114 Tenth intends to promptly pay all outstanding taxes and other charges, which will satisfy the interests of City and the Trust in tax collection while preserving its substantial value in its real property.

knowledge the process server gained while attempting to effect service. Here, the Trust claims it can avoid responsibility for whether there was real notice by electing not to use its own process server, but rather asking a government official, the New York Secretary of State, to provide the notice, and then never inquiring whether service succeeded. Due process requires, however, that the Trust not be permitted simply to disregard the Secretary's actual knowledge that service failed. Instead, a party, particularly a governmental actor, serving notice through a governmental official must be charged with the official's actual knowledge that service failed.

In *Jones*, this Court used the vivid example of a postman dropping notice letters down a storm drain to illustrate when additional notice is required "despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman." 547 U.S. at 229. Although this example is fanciful, it points out that a party is not absolved from its duty to provide due process by handing off notice for delivery by an ostensibly responsible governmental actor.

Cases applying *Jones* likewise hold that where a foreclosing party delegates responsibility for providing notice to a government official or agency, the foreclosing party is responsible for the acts of the delegate. In *Thompson-Green v. Estate of Drobish*, 142 P.3d 897, 2006 WY 126 (Wyo. 2006), a tax deed purchaser attempted to serve the property's co-owners through a sheriff's deputy, who personally served one co-owner, who claimed to also accept service the other co-owners.

However, the deputy did not make a required search for whether any of the other co-owners were county residents whom he would be required to personally serve. 142 P.3d at 901. Although the tax deed purchaser claimed "that she took 'all reasonable steps available to her to comply with the requirements of the statute,'" *Id.* at 900, the Wyoming Supreme Court found the deputy's deficient search rendered the service invalid under *Jones*. *Id.* at 901-03; *see also Wilson v. Blount County*, 207 S.W.3d 741, 748-51 (Tenn. 2006) (42 U.S.C. § 1983 due process violation claim upheld against county under *Mullane* and *Jones* where county gave sheriff's department a tax foreclosure summons to serve, and sheriff's officer issued return saying diligent search for owner had been undertaken, when only cursory search had been performed); *cf. Tayor v. Westly*, 488 F.3d 1197, 1201 (9th Cir. 2007) (where state controller sought to acquire property by escheatment, controller could not rely on notices sent by corporations, banks and other entities which turned property over for escheatment, finding "no authority for the proposition that reliance that the likelihood that a *third party* will give notice is 'constitutionally adequate'" and that such third party reliance is foreclosed by *Jones*).

Indeed, even before *Jones* it was recognized that due process charges delegating agencies with the knowledge acquired by their delegates. In *U.S. v. McGlory*, 202 F.3d 664 (3d Cir. 2000) (en banc), the DEA mailed a notice of forfeiture to a pretrial detainee, care of the U.S. Marshals Service. The majority held that due process required that the DEA mail the notice directly to the detainee, finding no authority "that suggests that the forfeiting agency may delegate its

responsibility by mailing notice to the Marshals Service in Pittsburgh when the forfeiting agency is aware the intended recipient is confined elsewhere." *Id.* at 672. In dissent, then-Circuit Judge Alito wrote that due process would have been satisfied by the DEA's mailing the notice to the Marshals Service, but only if a remand determined that the Marshals Service actually forwarded the notice to the detainee where he was housed. *Id.* at 675-76 (Alito, J., dissenting). Under either view, the forfeiting agency could not avoid responsibility for the notice actually being sent to the detainee, either because, under the majority view, delegation was prohibited, or because, under the dissent, the forfeiting agency would be held responsible for the actions (or inactions) of the agency to which the service was delegated.

Electing to give notice of this tax forfeiture through the Secretary of State does not absolve the Trust of its due process responsibilities to act as though it were desirous of actually informing 114 Tenth of this proceeding. *Mullane*, 339 U.S. at 315. Though the Trust may undoubtedly hand off the task of undertaking the certified mailing of notice to the Secretary, doing so cannot absolve the Trust from its non-delegable responsibility to ensure that the entire notice procedure provides due process under *Mullane* and *Jones*.

D. The Decision Below Conflicts with the Holdings of Other State and Federal Courts, Which Do Not Permit Mere Statutory Compliance To Excuse Further Notice Warranted Under the Circumstances

In blindly accepting the constitutionality of BCL § 306(b) service without considering unique circumstances, the Appellate Division's decision conflicts with how state courts of last resort and federal circuit courts have applied *Jones*. These other courts routinely review the circumstances of notice for due process even where all statutory formalities have been satisfied. For instance, the First Circuit held in a forfeiture case that, although the government complied with all statutory requirements for notice, "when the government knows or easily can ascertain the identity and whereabouts of a potential claimant, reasonableness requires the government, at a minimum, to take easily available steps in its attempt to notify the claimant." *U.S. v. One Star Class Sloop Sailboat*, 458 F.3d 16, 23 (1st Cir. 2006).

Several state supreme courts have applied this directly to tax foreclosures, finding due process to be lacking despite strict statutory compliance. The Supreme Court of Michigan held that a statute that limited the circuit court's jurisdiction to modify foreclosure judgments to be invalid and unconstitutional as applied to property owners who did not receive constitutionally adequate notice. *In re Treasurer of Wayne County for Foreclosure*, 478 Mich. 1, 10, 732 N.W.2d 458, 462-63 (2007); *see also Sidun v. Wayne County Treasurer*, 481 Mich. 503, 511, 751 N.W.2d 453,

459 (2008) ("even if a statutory scheme is reasonably calculated to provide notice in the ordinary case, the United States Supreme Court has nevertheless 'required the government to consider unique information about an intended recipient.'" (quoting *Jones*, 547 U.S. at 230)); *Vosilla v. Rosado*, 944 So.2d 289 (Fla. 2006) (holding foreclosure notice sent in compliance with statutory notice requirements violated due process where owners had provided taxing authority with a change of address); *Wilson*, 207 S.W.3d at 750 ("when the party's name and address are 'reasonably ascertainable,' constructive notice alone is not constitutionally adequate." (quoting *Mennonite Board of Missions v. Adams*, 462 U.S. 791, 798 (1983)).

In direct contrast to these circuit and state supreme court decisions requiring more than blind statutory compliance, the Appellate Division unquestioningly upheld BCL § 306(b) service, finding no "reason to believe that such service is unconstitutional." (App. A, 2a-3a). Had the Appellate Division analyzed the actual circumstances of this particular service, it would have found that the information available to the Trust required it to take additional reasonable steps to inform 114 Tenth of the proceedings.

E. By Failing to Provide Further Notice Here, the Trust Denied 114 Tenth The Due Process Required by the Fourteenth Amendment

Because of the widely recognized problems of BCL § 306(b) service, problems shared at least in part with the Substituted Secretary Service of most states, the Trust was under a duty to inquire of the Secretary of

State whether notice had actually been received by 114 Tenth or if it had been returned, particularly where the Trust should have known – standing in the shoes of the City – that 114 Tenth was continuing to pay taxes. In upholding the Trust's conduct, the Appellate Division ignored the teachings of *Mullane* and *Jones* and denied 114 Tenth the due process to which it is entitled under the Fourteenth Amendment.

Although the decision below directly affects only New York City's tax collection procedures, because such procedures are likely to be used as a model for other states and municipalities that wish to obtain the immediate financial benefits available from securitizing their tax liens, it is important that this Court review and reverse the Appellate Division decision below so that taxpayers everywhere will not have their property taken without notice sufficient to satisfy the requisites of due process.

CONCLUSION

For the foregoing reasons, Petitioner 114 Tenth Avenue Assoc., Inc. respectfully requests that this Court grant this petition for a writ of certiorari to review the Appellate Division decision below.

Respectfully submitted,

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